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NOTE AND COMMENT

THE "RIGHT" TO BREAK A CONTRACT.—It is common knowledge that the fully developed common law affords no means to compel the performance of a contract according to its terms. Does it follow from this that there is no legal obligation to perform a contract, or if obligation there be, that it is alternative: to perform or pay damages? A note in the XIV MICH. L. REV. 480 appears to give an affirmative answer to this question and at least one court (*Frye* v. *Hubbell*, 74 N. H. 358, at p. 374) has taken the same view. Probably the most forcible exposition of this position is given by Justice Holmes in his admirable address, "THE PATH OF THE LAW" (10 HARV. L. REV. at p. 462). The passage is sufficiently picturesque to deserve quotation: "Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. Among other things, here again the so called primary rights and duties are invested with a mystic significance beyond what can be assigned and explained. The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference. But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as

they can. It was good enough for Lord Coke, however, and here, as in many other cases, I am content to abide with him."

Why was it good enough for Lord Coke? Perhaps the history of the common law affords some explanation. Pollock and Maitland have shown (HIST. OF ENG. LAW (ed. 2) II, 595 ff.) that specific relief is certainly as old, probably older than the action for damages. In the time of Glanville 'damages' are a novelty. A plaintiff goes to the king's court and asks for a specific thing, of which the defendant unjustly 'deforces' him. He does not want money, compensation; he wants and gets the specific thing. Of the oldest group of actions there is not one which is an action for damages. It is true that most of the judgments in favor of plaintiffs are judgments awarding seisin of land (POLLOCK AND MAITLAND, *op. cit.*, II, 523), but the law, not content to stop at this, aimed at specific relief even in case of the breach of a contractual obligation. Putting aside the action of Debt, where the specific character of the relief may be a coincidence, some insight into the attitude of the early common law may be gained from the action of Covenant. This action was probably invented for the protection of the termor, who had no real right in the land, only the benefit of a covenant. But the relief which he obtained was not damages, as a case in 1226 (BRACTON'S NOTE BOOK, pl. 1739) shows beyond question. A lessor broke his agreement (*conuencio*) that his lessee should hold the land for ten years. The court decided that the agreement must be kept and that the plaintiff should recover seisin, or, as we should say, possession, of the land. (*Et ideo consideratum est quod conuencio teneatur et quod Hugo habeat seisinam suam usque ad terminum suum* * * *) If this is not a judgment for the 'specific performance' of the covenant, it is difficult to say what it is. But of course a judge of the thirteenth century, as an ecclesiastic, would probably have no scruples about importing ethics into the law! Such a judgment, however, is no isolated phenomenon. Cf. HAZELTINE, EARLY HISTORY OF ENGLISH EQUITY, ESSAYS IN LEGAL HISTORY (ed. Vinogradoff) 269, ff.; POLLOCK AND MAITLAND, *op. cit.* II, 595. It was thoroughly in keeping with the spirit of the common law at its great formative period. Bracton probably gave expression to a truism when he wrote (fol. 413 b): "* * * *Tot erunt formulae brevium quot sunt genera actionum* * * *." There may be as many forms of action as there are causes of action; that is to say, the remedy necessarily follows the right and the first inquiry should always be: What is the right? If there be a right, it should have an appropriate remedy. And the judges seemed convinced that the obligation of the covenantor was to perform his covenant. An action was invented to compel him so to do.

Had the common law continued its organic development, it is possible that specific relief might have been the rule rather than the exception; but the gradually encroaching power of parliament stifled its growth. The STATUTE OF WALES struck a heavy blow at Covenant, and the conservatism of the judges robbed that action of its possible contributions to the law of contract. The chancery did vary some formulas to suit new cases, but this power was used rarely and with great caution. The inevitable result was that the mediæval common law became a law about remedies. See Maitland in 3

HARV. L. REV. 97. In the YEAR BOOKS there is little or no talk of substantive law; it is procedure with which the judges are occupied. No longer is any such work as that of Bracton possible; for the lawyer is interested in the nature of writs, not of rights. Thus Bracton's striking statement remains true only if inverted. From the forms of action the causes of action must be deduced. There is a right only where there is a remedy. And the remedy for breach of contract is found in what was originally a tort action; naturally it sounds only in damages. It is not difficult, therefore, to see why the mediæval lawyer, constrained to think in the terms of remedies, should regard the right of the promisee as confined to damages only. There could be no obligation to perform a contract if the chancery afforded no writ to enforce such an obligation.

It may be that some such thought was present in the mind of Lord Coke. In *Bromage* v. *Genning* (1 Roll. R. 368; AMES, CASES IN EQUITY JURISDICTION, 38, n.) a plaintiff sought a prohibition from the King's Bench against a suit for specific performance of a lease, on the ground that the proper remedy was an action at law. Coke was clearly of opinion that a court of equity should not decree specific performance for that "this would subvert the intent of the covenantor, since he intended to have his election to pay damages or to make the lease, and they would compel him to make the lease against his will * * *." It is no coincidence that the year of this decision, 1616, was the very year of the bitter controversy between Lord Coke and Lord Ellesmere, the results of which are familiar to every one. The supremacy of the court of Chancery was established, and, as Ames has well said, Lord Coke's defeat in his contest with Lord Ellesmere was matched by his failure to check the jurisdiction of the chancellor in matters of contract. Ames, *loc. cit.* Coke took a purely formal view of the obligation of the promisor. Though he may have justified it to himself by reasoning from remedy to right, he was no doubt eager to find any basis upon which to challenge the jurisdiction of Chancery. One can scarcely regard his attitude as other than that of a special pleader.

Equity has taken a substantial view. In decreeing specific performance it enforces the contractual obligation of the promisor according to the terms of his promise, so far as that is possible. But the obligation is a legal obligation and equity is acting in aid of a legal right. That the obligation is essentially legal, though not enforced specifically by a court of law, may be seen if the matter be looked at from another angle. Where there has been a repudiation of a contract or a material breach, the aggrieved party is not always driven to an action for damages, even when he may not resort to equity. If he has himself performed in whole or in part, he may elect to disregard the contract and demand restitution in value for what he has done. He has thus a "right to restitution as an alternative remedy instead of compensation in damages". WILLISTON'S WALD'S POLLOCK ON CONTRACTS, p. 334 ff. The primary right remains, however, the right to performance; the only primary obligation is the obligation to perform the contract. WOODWARD, QUASI CONTRACTS, § 260. What becomes, then, of the right to break a contract? What

has befallen the promisor's prediction that he will only pay damages if he does not perform? Specific performance in equity and restitution at law give a pertinent answer to these questions.

Undoubtedly the promisor who cannot be compelled to perform his promise does have some definite legal capacity. It seems more accurate to describe this as a power,—a power to break the contract. As Professor Hohfeld has pointed out in a spirited article (FUNDAMENTAL LEGAL CONCEPTIONS, 23 YALE L. JOURN. 16, ff.), right and duty are correlative terms. There can be no right without a duty. But the correlative of power is liability. Thus the promisor may have the ability or power to alter the legal relations growing out of the contract, to create in himself a liability. The duty of the promisor is, with due respect to Justice Holmes, to perform his promise, but by the exercise of a power he may in certain cases convert this duty into a liability. The exercise of a power in such case is wrongful but effectual; for it is of the essence of a power that it may alter, divest, or create rights.

It is submitted, therefore, that neither the history of the common law nor logic sustains the proposition that there is no legal obligation to perform a contract or, conversely, that there is a right to break a contract. To support such a notion is to hark back to the later YEAR BOOKS which ascribe property (*propretie*) to the trespasser, even to the thief, because, forsooth, the owner has no action against the third hand. Cf. POLLOCK AND MAITLAND, *op. cit.*, II, 156, ff. The unhappy results of this vicious process of reasoning are sufficiently striking to warn us of the danger involved in a similar mistake today. W. T. B.

CONSTITUTIONALITY OF SEGREGATION ORDINANCES.—The effort of various southern states to segregate white persons and colored ones into mutually exclusive residential districts has received a final quietus, unless the Supreme Court of the United States shall reverse itself, by the decision in *Buchanan* v. *Warley*, handed down November 5, 1917. The suit in this case was for specific performance of a contract to buy land. The contract expressly stipulated that the buyer, a colored man, was not to be held to his purchase unless he had "the right under the laws of the state of Kentucky and the city of Louisville to ocupy said property as a residence." His objection to performance was based on the fact that an ordinance of the city forbade persons of one color "to move into and occupy as a residence" a house in any block in which a majority of houses were already occupied by persons of the other color. The ordinance expressly excluded from its operation persons who had already acquired the right of occupancy of a building or had, by previous rental, established the color of occupancy. The Supreme Court of Kentucky had held this ordinance to be valid and, because of the terms of the contract, a defense to the suit for performance. The Federal Supreme Court reversed this decision and declared the ordinance unconstitutional. The court comments upon the ordinance in some respects as though it denied rights to colored persons only, but the court's